UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

In re BCE WEST, L.P., *et al.*,	In Chapter 11 proceedings
EID # 38-3196719	Case Nos. 98-12547 through 98-12570-ECF-CGC
	Jointly administered
Debtors.	UNDER ADVISEMENT ORDER RE: THIRD MOTION TO ASSUME AMENDED REAL PROPERTY LEASE TO STORE NO. 987

BCE West, L.P., Boston Chicken, Inc., Mayfair Partners, L.P. ("Mayfair"), debtors, and debtors in possession (collectively "Debtors") seek to assume a nonresidential real property lease with Fairfax Plaza Company ("Fairfax"). Fairfax does not object to assumption of the original lease under the terms of the original lease, but does object to assumption of the lease pursuant to the terms of what it alleges is a negotiated but unexecuted amendment to the lease.

The underlying facts are undisputed and are taken directly from the parties' Joint Pretrial Statement. Prior to Debtors filing bankruptcy, Mayfair was a party to a non-residential real property lease with Fairfax pertaining to Store No. 987 located at 2988 Gallows Road, Falls Church, Virginia. After Debtors filed bankruptcy, Mayfair, through its authorized agent Huntley Financial Group ("Huntley"), negotiated with Fairfax to reduce the rent obligations under the lease. On March 9, 1999, Huntley forwarded an Addendum to Lease Agreement ("Lease Addendum") to Fairfax for execution. The Lease Addendum contained modifications to the rent provisions under the original lease agreement resulting in rent reductions over a three-year period.

On March 15, 1999, Fairfax executed the Lease Addendum and returned it to Debtors, along with a letter from Fairfax stating "please understand that this Agreement is conditioned upon our receipt of a fully executed copy of the Agreement and Notification of the Satisfaction of the Conditions in Paragraph 4, on or before June 15, 1999." Paragraph 4 of the Lease Addendum in turn provided that the Lease Addendum was expressly conditioned upon Bankruptcy Court approval.

On March 25, 1999, Debtors signed the Lease Addendum.[1] On April 5, 1999, Debtors filed the Third Motion for Authority to Assume Non-Residential Real Property Leases, as Amended, which included the assumption of the Lease with Fairfax and the Lease Addendum recently signed by Fairfax and Debtors. Debtors served Fairfax with a copy of this motion and on April 12, 1999, Fairfax notified Debtors it was withdrawing and canceling the Lease Addendum because it had not received an executed copy of the Lease Addendum pursuant to the terms of its March 15, 1999, letter. On April 19, 1999, Debtors advised Fairfax that it considered Fairfax's attempt to withdraw and cancel the Lease Addendum ineffective because the Lease Addendum had already been signed by both Debtors and Fairfax and thus fully executed. Fairfax disagreed and requested Debtors return the Lease Addendum and mark it "void." By letter dated April 21, 1999, Debtors sent to Fairfax the Lease Addendum signed by both Debtors and Fairfax.

The dispute centers on whether a valid and binding Lease Addendum existed prior to the April 12 withdrawal letter or whether Debtors' failure to return a copy of the fully executed Lease Addendum upon execution permitted Fairfax to cancel and withdraw its offer at any time before receiving an executed copy of the Lease Addendum, thereby preventing the formation of a binding contract.[2]

Virginia follows the general rules of contract creation as set forth in the Restatement (Second) of Contracts. *See Woodward v. Commonwealth of Virginia,* 438 S.E.2d 777 (Va. Ct. App. 1993). An offer may be withdrawn at any time before acceptance. *W.B. Chittum v. Potter,* 219 S.E.2d 859, 864 (Va. 1975); *Crews v. Sullivan,* 113 S.E. 865, 867 (Va. Ct. App. 1922). An acceptance is a promise to be bound by the terms of the offer such that there is a meeting of the

---

[1]Fairfax has not stipulated to this fact; however, it was established by the evidence and the Court so finds.

[2]The Court rejects Debtors' argument that the Lease Addendum sent initially by Huntley constituted an offer. Debtors admit that Huntley was engaged solely to help Debtors negotiate new lease terms with existing landlords, but that Huntley had no authority to bind Debtors. Debtors could only be bound to the terms of the Lease Addendum upon Debtors' review and execution of the Lease Addendum.

minds. *Green v. Investors Home Mortgage Corp.*, 1988 WL 619238 (Va. Cir. Ct. 1988). Under this standard, Debtors accepted Fairfax's offer when they signed the Lease Addendum on March 25, 1999, and sought Bankruptcy Court approval of the lease, thereby evidencing their intent to be bound by the terms of the Lease Addendum.

Fairfax argues, however, that it expressly conditioned Debtors' acceptance of the offer on two conditions, such that Debtors' signature of the Lease Addendum alone was insufficient to create a binding contract. According to Fairfax, it conditioned Debtors' acceptance of the offer on Fairfax's receipt of a fully executed copy of the Lease Addendum and on notification that the Bankruptcy Court had approved the Lease Addendum. Because it had not yet received a fully executed copy of the Lease Addendum, it contends it still had authority to revoke its offer.[3] The Court disagrees.

First, Fairfax takes inconsistent positions with respect to the two conditions it imposed on Debtors. On the one hand it argues that it had the ability to revoke the offer at any time up until the point Debtors returned to it a fully executed copy of the Lease Addendum. On the other hand it argues that it could not revoke the offer once it received a fully executed copy of the Lease Addendum even though the Bankruptcy Court had yet to approve the Lease Addendum. Fairfax's letter makes no distinction, however, between the two conditions it imposed. Fairfax does not explain why one condition must be satisfied first for there to be a binding contract while the remaining condition need not be satisfied first for there to be a binding agreement. Fairfax tied both conditions together in its offer and gives no explanation why they should be treated differently. Moreover, a reasonable reading of Fairfax's letter suggests that both conditions could be satisfied at the same time, as long as Fairfax was given notice by June 15, 1999. It also makes sense that Debtors would seek Bankruptcy Court approval first and then send both a fully executed copy of the Lease Addendum and notice of court approval to Fairfax simultaneously.

---

[3]Section 60 of the Restatement (Second) of Contracts provides that an "[i]f an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded." Restatement (Second) of Contracts § 60 (1979); *see also* Williston on Contracts § 89 (3d ed. 1957).

Second, the Court does not find the conditions Fairfax imposed within the parameters of § 60 of the Restatement (Second) of Contracts. Fairfax does not say in its letter that "acceptance" of the offer is conditioned on the receipt of a fully executed copy of the Lease Addendum or that in order for Debtors' acceptance to become effective it must receive a fully executed copy of the Lease Addendum. Instead, Fairfax appears to acknowledges the creation or existence of the contract by saying "this Agreement" is conditioned upon the receipt of a fully executed copy of the Lease Addendum. There is nothing to suggest that the return of the fully executed Lease Addendum is a condition precedent to the forming of a binding contract. In fact, Fairfax's language suggests the contrary, that the parties had an "Agreement," which would be breached or terminated if the conditions were not satisfied subsequently.

Moreover, the fact remains that what the parties were seeking to do was renegotiate the original lease so that Debtors could continue in possession of the property and Fairfax could continue with its lessee. Notification to Fairfax that Debtors had in fact signed and the Court had approved the Lease Addendum were less a condition to the creation of a binding contract and more a requirement of timely notice to Fairfax of their status as landlord and tenant. Fairfax received notice that Debtors had executed the Lease Addendum when it received a copy of the Third Motion for Authority to Assume Non-Residential Real Property Leases, as Amended. Further, the deposition of Richard Bacas, one of the general partners of Fairfax, strongly suggests that Fairfax's opposition to the Lease Addendum had more to do with Fairfax's perception that it improvidently entered into this Lease Addendum and less to do with its contention that Debtors failed to comply with its conditions. Certainly Fairfax has not pointed to anything to suggest that it has been damaged in any way by having received notice of Debtors' execution of the Lease Addendum via the motion to assume. And, ultimately, Debtors did provide Fairfax with an executed copy of the Lease Addendum well before the June 15, 1999, deadline.

Therefore, the Court overrules Fairfax's objections to Debtors' motion to assume and grants Debtors' requested relief. Debtors to prepare and lodge a form of order consistent with this ruling.

So ordered.

DATED: AUG 18 1999

CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing mailed
this 18 day of August, 1999, to:

UNITED STATES TRUSTEE
P O BOX 36170
PHOENIX AZ 85067-6170

H. Rey Stroube, III
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
Pennzoil Place - South Tower
711 Louisiana Street, Suite 1900
Houston, Texas 77002

Randolph J. Haines
LEWIS AND ROCA L.L.P.
40 North Central Avenue
Phoenix, Arizona 85004-4429

William Novotny
MARISCAL, WEEKS, MCINTYRE & FRIEDLANDER, P.A.
2901 North Central Avenue, Suite 200
Phoenix, Arizona 85013-2705